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LEE KAI WUEN & ANOR v. LEE YEE WUEN

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ZABIDIN MOHD DIAH JCA
S NANTHA BALAN JCA
DARRYL GOON SIEW CHYE JCA
B [CIVIL APPEAL NO: J-02(IM)(NCC)-1315-09-2020]
26 MAY 2022

Abstract – *In Mareva type of injunction, a real risk of dissipation of assets is an essential ingredient, wherein the injunction purports to prevent a plaintiff from being cheated out of the proceeds of an action, should he be successful, by a defendant transferring his assets abroad or dissipating his assets within the jurisdiction. The need for evidence of a real risk of dissipation lies at the very heart of the jurisdiction and its raison d'etre. There is no exception to the rules, such that this ingredient may be presumed in any identified circumstances. Hence, to hold a real risk of dissipation of assets may be presumed is effectively to negate the need to actually establish that such a risk exists.*

CIVIL PROCEDURE: *Injunction – Mareva injunction – Allegations of misappropriation by shareholders of monies belonging to company – Shareholders caused customers of company to pay monies due to company into joint accounts belonging to shareholders – Whether there was direct evidence of any risk that shareholders might dispose of or dissipate assets or put assets beyond reach of complainant – Whether there was evidence of actual attempt of dissipation of assets – Whether vital ingredients before Mareva injunction may be issued established*

COMPANY LAW: *Oppression – Allegations of – Misappropriation by shareholders of monies belonging to company – Shareholders caused customers of company to pay monies due to company into joint accounts belonging to shareholders – Attempt to appoint someone privy to misappropriation as director of company – Whether there was misappropriation of company's funds – Whether tantamount to oppression – Companies Act 2016, s. 346*

The appellants and the respondent were immediate family members where the first appellant and the respondent were brother and sister, respectively and the second appellant was their mother. The second appellant and her husband ('deceased') (also father of the first appellant and the respondent) founded a company where the deceased, the respondent and the first appellant each held 51%, 29% and 20% of shares, respectively. There were only two directors in the company, namely the deceased and the first appellant. The deceased fell into a coma and thereafter passed away. Upon the demise of the deceased, the respondent and the first appellant each inherited 25.5% of the deceased's 51% in the share capital of the company. The respondent now held 54.5% while the first appellant held 45.5% of shares in the company. The respondent brought originating summons ('OS') against the appellants in respect of the affairs of the company, upon

allegations of oppression within the terms of s. 346 of the Companies Act 2016 ('CA'). According to the respondent, when the deceased fell into a coma, the appellants caused customers of the company to pay monies that were due to the company into a joint account in OCBC Bank ('OCBC joint account') and subsequently, into a joint account in United Overseas Bank ('UOB joint account') ('joint accounts'). The OCBC joint account was in the names of the deceased and the second appellant. The UOB joint account was in the joint names of both the appellants. Based on the details provided by the respondent, the total amount paid by the customers in the joint accounts was RM3,412,829.41. Hence, a *Mareva* injunction was sought and obtained subject to a limit of RM3,412,829.41. The respondent further alleged that 'In furtherance of the misappropriations …', the first appellant purported to pass certain directors' resolutions of the company that were only signed by him alone ('resolution of 15 September 2018'). The respondent contended that (i) this resolution was invalid and given that the second appellant had misappropriated monies belonging to the company, the second appellant would unlikely act in the interest of the company; (ii) documentation was also prepared for her appointment as a director of the company but she declined; and (iii) the appellants may dissipate their assets and thus defeat any judgment that the respondent might secure for the return of the monies. The *inter partes* application for the *Mareva* injunction was heard and an interlocutory *Mareva* injunction in terms of the *ad interim Mareva* injunction was granted by the High Court. Hence, this appeal by the appellants against the grant of the interlocutory *Mareva* injunction.

Held (allowing appeal)
Per Darryl Goon JCA delivering the judgment of the court:

(1) To secure a *Mareva* injunction, three vital ingredients must be established, namely: (i) that the applicant had a good arguable case; (ii) that the respondent had assets within the jurisdiction; and (iii) that there was a real risk that the assets would be dissipated or placed beyond the reach of the applicant before judgment. That the appellants had assets within the jurisdiction was not a fact in dispute. The main ingredients that gave rise to serious contentions were whether there existed a good arguable case in favour of the respondent and whether there was a real risk that the appellants would dissipate or dispose of their assets to defeat any judgment that may be entered in the respondent's favour. (paras 56, 58 & 60)

(2) There were documentary evidence of payments in the form of statements and vouchers produced which demonstrated that there were payments made to the account of the company, out of the joint accounts. There did not appear to have been any attempt by the appellants to conceal the payments of the allegedly misappropriated monies into the joint accounts. In fact, the payments were documented. Reference may be

made to the statements, banking-in slips, cheques and the general ledger of the company that were produced in evidence. These were records kept of the payments. There were also records of the payments made into the joint accounts from the company's customers from which details thereof could have been obtained by the respondent. (paras 70 & 71)

(3) The resolution of 15 September 2018, the validity of which was being challenged, was an unconcealed disclosure of the intention to fund the company's financial requirements and commitment by the use of an alternative bank account. That there was a need to use the joint accounts was corroborated by the fact that the deceased was the only signatory for the company and the arrangement was only put in place after the deceased fell into a coma, leading to his subsequent demise. This was when the first appellant had found himself to be the only director, without any means to effect payments to meet the company's financial obligations. This too was compounded by the fact that it was the respondent who, at that material time, refused to be appointed director and objected to the second appellant's appointment as a director. (para 105)

(4) Whether misappropriation of company's funds may be tantamount to oppression within the ambit of s. 346 of the CA, is necessarily fact sensitive and subject to the circumstances in each case. There was no direct evidence led of any risk that the appellants might dispose of or dissipate their assets or put their assets beyond the reach of the respondent should she succeed in securing the reliefs sought. There was no evidence of any actual attempt of both the appellants to dissipate any of their assets or any instance of any actual dissipation of either appellants' assets. The High Court Judge erred in presuming or in inferring that there was a real risk of dissipation of assets by the appellants or either of them, upon the evidence adduced and in the circumstances of this case. This vital ingredient that needed to be established before a *Mareva* injunction may be issued was not established. (paras 84-86 & 111)

Case(s) referred to:

American Cyanamid Co v. Ethicon Ltd [1975] AC 396 ***(refd)***

Ananda Kumar Krishnan v. LS Fishery Sdn Bhd & Ors [2021] 1 LNS 641 HC ***(refd)***

Bank Mellat v. Nikpour [1985] FSR 87 ***(refd)***

Biasamas Sdn Bhd & Ors v. Kan Yan Heng & Anor [1998] 4 CLJ 754 CA ***(refd)***

Bouvier, Yves Charles Edgar And Another v. Accent Delight International Ltd & Another And Another Appeal [2015] SGCA 45 ***(refd)***

Bright Rims Manufacturing Sdn Bhd v. Victor Taichung Machinery Works Co Ltd & Anor [2007] 4 CLJ 230 CA ***(refd)***

Bumi Armada Navigation Sdn Bhd v. Mirza Marine Sdn Bhd [2015] 5 CLJ 652 HC ***(refd)***

Creative Furnishing Sdn Bhd v. Wong Koi [1989] 2 CLJ 93; [1989] 1 CLJ (Rep) 22 SC ***(refd)***
Derby & Co Ltd v. Weldon [1990] Ch 48 ***(refd)***
Dopag Dosiertechnik Und Pneumatik AG v. Gamel Nasir Taib & Ors [2017] 5 CLJ 727 HC ***(refd)***
Dynasty Rangers (M) Sdn Bhd v. SBSK Plantations Sdn Bhd [2001] 7 CLJ 168 HC ***(refd)***
EHQ Projects Sdn Bhd & Ors v. Equipro Sdn Bhd & Ors [2008] 7 CLJ 343 HC ***(refd)***
Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***
Lee Yee Wuen v. Lee Kai Wuen & Ors [2020] 1 LNS 1676 ***(refd)***
Mareva Compania Naviera SA v. International Bulkcarriers SA [1975] 2 Lloyd's Rep 509 ***(refd)***
Metrowangsa Asset Management Sdn Bhd & Anor v. Ahmad Hj Hassan & Ors [2004] 1 LNS 699 HC ***(refd)***
Mitchell v. Henry (1880) 15 Ch D 181 ***(refd)***
Multi-Code Electronics Industries (M) Bhd & Anor v. Gordon Toh Chun Toh & Ors [2009] 9 CLJ 659 HC ***(refd)***
Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft mbH & Co KG; The Nidersachsen [1984] 1 All ER 398 ***(refd)***
Nippon Yusen Kaisha v. Karageorgis [1975] 1 WLR 1093 ***(refd)***
Oon Ah Baa & Ors v. Eagle & Pagoda Brand Teck Aun Medical Factory Sdn Bhd & Ors (No 2) [2003] 1 LNS 537 HC ***(refd)***
PCW (Underwriting Agencies) Ltd v. Dixon & Anor [1983] 2 All ER 158 ***(refd)***
Pharmmalaysia Bhd v. Dinesh Kumar Jashbhai Nagjibha Patel & Ors [2004] 7 CLJ 465 HC ***(refd)***
Rasu Maritima SA v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara; Government Of The Republic Of Indonesia Intervening [1977] 3 WLR 518 ***(refd)***
S & F International Ltd v. Trans-Con Engineering Sdn Bhd [1985] 2 CLJ 228; [1985] CLJ (Rep) 280 FC ***(refd)***
Siskina (Owners of Cargo Lately Laden on Board) v. Distos Compania Naviera SA [1979] AC 210 ***(refd)***
Tsoi Ping Kwan v. Loh Lai Ngoh & Anor [1997] 3 CLJ 552 CA ***(refd)***
Zainal Abidin Hj Abdul Rahman v. Century Hotel Sdn Bhd [1982] 1 LNS 34 FC ***(refd)***
Zschimmer & Schwarz GmbH & Co KG Chemische Fabriken v. Persons Unknown & Anor [2021] 4 CLJ 446 HC ***(refd)***

Legislation referred to:
Companies Act 2016, ss. 345, 346(2), 351
Rules of Court 2012, O. 29 r. 1(2A), (2B), O. 88 r. 2

For the appellants - Chua Kim Hong Rudeen & Wong Kum Heng; M/s Rudeen Chua & Co
For the respondent - Foo Joon Liang & Lee Xin Div; M/s Gan Partnership

[Editor's note: For the High Court judgment, please see Lee Yee Wuen v. Lee Kai Wuen & Ors [2020] 1 LNS 1676 (overruled).]

Reported by Lina E

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JUDGMENT

Darryl Goon Siew Chye JCA:

Introduction

B **[1]** This was a case that concerned disputing family members in a corporate setting. The central issue in this appeal was whether an interlocutory *Mareva* form of injunction should have been granted against the appellants by the High Court.

C **[2]** The originating process in this appeal was an originating summons taken out by the respondent, as plaintiff, against the appellants, who were the first and second defendants.

D **[3]** By this originating summons, the respondent invoked ss. 345, 346 and 351 of the Companies Act 2016 and O. 88 r. 2 of the Rules of Court 2012. Thus, the originating summons was one founded upon the provisions of the Companies Act of 2016 for remedies in respect of oppression. The company central to the case was Kien Yiap Trading Sdn Bhd ('company'), which was cited as the third defendant in the originating summons.

The Injunctions

E **[4]** On 21 February 2019, the respondent secured an *ex parte* interim *Mareva* injunction against the appellants. On 6 March 2019, an *ad interim Mareva* injunction appeared to have been granted against the appellants upon the terms of the earlier granted *ex parte* injunction, effective from 13 March 2019. That this appears so is because this order, dated 6 March 2019 was, unfortunately, unhappily worded thus, 'IT IS HEREBY ORDERED that the F *ad interim* is extended from 13 March 2019 until the disposal of the *inter partes* application'. As worded, the order suggests that there was a prior *ad interim* order granted and which was being extended. However, be that as it may, it would have been clear enough, certainly to the parties involved, that the order of 6 March 2019 was actually the grant of an *ad interim* order G pending the *inter partes* hearing of the application for an interlocutory *Mareva* injunction until the disposal of the originating summons.

[5] In addition, and also on 6 March 2019, the *ad interim Mareva* injunction granted contained a variation that allowed for certain payments to be made by the appellants. The material part of this variation order of H 6 March 2019 states as follows:

> 1. The Order dated 21 February 2019 be varied to allow the following payments to be made by the 1st and 2nd Defendants' ("4 Payments"):
>
> I 1.1 RM4,767.00 to Public Bank Bhd being instalment for shop house Lot No. 32, Kimanis Centro, Kimanis Papar, Sabah;

1.2 RM25,000.00 for CP204 Company Income Tax Instalment 2019;

1.3 RM6,021.00 to Public Bank Bhd being instalment for Kobelco S200XDL-10 with registration no. JSM 762; and

1.4 RM7,995.00 to Public Bank Bhd being instalment for Mercedes Benz S400 with registration no. JDL 8.

2. The 1st and 2nd Defendants shall make the 4 Payments directly to the said creditors.

[6] Why this variation was required is unclear. There was no outright restriction against the appellants from disposing any of their assets as such. Whether the variation was meant to permit the appellants to utilise their monies and assets, including those from the identified accounts, for the specified payments even if it would deplete their assets and monies below the limit stipulated in the order of 21 February 2019 *ie*, RM3,412,829.41, is unclear.

[7] On 15 September 2020, the *inter partes* application for the *Mareva* injunction was finally heard and an interlocutory *Mareva* injunction in terms of the *ad interim Mareva* injunction was granted by the High Court against the appellants.

[8] The material parts of the *Mareva* injunction granted were the following:

1. The 1st and 2nd Defendants be prohibited from removing from Malaysia in any way, dispose of or deal with or diminish the value of any of their assets which are in Malaysia whether in their own name(s) or not and whether solely or jointly owned up to the value of RM3,412,829.41 ("*Mareva* Sum")

1.1 This prohibition includes any real properties and any credit balance or monies as may or may thereafter be held at any financial institutions, including but not limited to the following bank accounts:

i. OCBC Account No. 7152544566; and

ii. UOB Account No. 1493000867.

1.2 If the total unencumbered value of the 1st and/or 2nd Defendants' assets in Malaysia exceeds the *Mareva* Sum, the 1st and/or 2nd Defendants may remove any of those assets from Malaysia or may dispose of or deal with them so long as the total unencumbered value of the assets still in Malaysia remains not less than the *Mareva* Sum.

[9] The interlocutory *Mareva* injunction granted against the appellants on 15 September 2019 was thus targeted against dissipation of the appellants' assets generally and, specifically, dissipation of monies in the two identified bank accounts. This was thus an appeal by the appellants against the grant of the interlocutory *Mareva* injunction.

A **[10]** Upon hearing the parties, the appellants' appeal was unanimously allowed and this is the judgment of the court with the reasons therefor.

The Background

[11] The appellants and the respondent are immediate family members. The first appellant and the respondent are brother and sister respectively. The second appellant is their mother and a Singaporean citizen.

[12] The company is a family company. It has been a successful company dealing with timber and is said to have assets in excess of RM150 million, with revenue in excess of RM30 million. It was a company founded by one Lee Poh Sin (deceased), and the second appellant, sometime in 1992. He, Lee Poh Sin ('deceased') was the father of the first appellant and the respondent.

[13] Thus, the originating summons was brought by the respondent, against her brother and mother in respect of the affairs of the company.

[14] Prior to the demise of the deceased, the shareholding in the company was as follows:

(i) the deceased had 51% of the issued share capital amounting to 255,002 units of shares;

(ii) the respondent had 29% of the issued share capital amounting to 145,001 units of shares; and

(iii) the first appellant had 20% of the issued share capital amounting to 145,001 units of shares.

There were only two directors in the company namely, the deceased and the first appellant.

[15] Sometime around 27 August 2018, the deceased collapsed and fell into a coma. Following this, the deceased unfortunately passed away on 10 September 2018.

[16] Upon the demise of the deceased, the respondent and the first appellant each inherited 25.5% of the deceased's 51% in the share capital of the company. Thus, after the demise of the deceased and upon completion of the transfer of his shares in the company, the shareholding in the company became as follows:

(i) the respondent with 54.5% of the issued share capital of the company; and

(ii) the first appellant with 45.5% of the issued share capital of the company.

The Respondent's Case

[17] The originating summons was taken out by the respondent upon allegations of oppression within the terms of s. 346 of the Companies Act 2016.

[18] The basis of the complaint of oppression was founded mainly on two grounds, namely (i) the appellants had misappropriated monies belonging to the company; and (ii) an attempt by the first appellant to appoint the second appellant as a director of the company, someone who was privy to the alleged misappropriation.

[19] According to the respondent, when the deceased fell into a coma around 27 August 2018, the appellants caused customers of the company to pay monies that were due to the company into a joint account in OCBC Bank, OCBC Account No. 7152544566 ("OCBC joint account") and, subsequently, into a joint account in United Overseas Bank, UOB Account No. 1493000867 ("UOB joint account"). These two accounts shall hereinafter be referred to collectively as the 'joint accounts'.

[20] Among these customers of the company were Legend Wood Sdn Bhd ("Legend Wood"), Gee Harp Timber Sdn Bhd ("Gee Harp"), Kimniaga Sdn Bhd ("Kimniaga"), Kluang Sawmill Sdn Bhd ("Kluang Sawmill") and Kim Yeo Timber Trading Sdn Bhd ("Kim Yeo").

[21] The OCBC joint account was an account in the joint names of the deceased and the second appellant.

[22] As for the UOB joint account, although para. 13.4 of the respondent's affidavit states that it was the first appellant's personal account, subsequent paragraphs described the UOB account as a 'joint account'. It later became clear that the UOB joint account was in fact a joint account in the name of both the appellants.

[23] Based on the details provided by the respondent, payments were made by the company's customers into the OCBC joint account on the 4 and 5 September 2018. Subsequently, on 19 September 2018 onwards to the 8 December 2018, payments from the company's customers were made into the UOB joint account.

[24] Details of these payments made into the OCBC joint account and, subsequently, into the UOB joint account, in terms of the amount paid and date of payment, were provided by the respondent in her affidavit. According to the respondent, the total amount paid by these customers into the joint accounts was RM3,412,829.41.

[25] Hence, the *Mareva* injunction sought and obtained was subject to a limit of RM3,412,829.41 which is the minimum value of the appellants' assets, including the monies in the joint account, that is to be maintained and prohibited from disposal.

[26] The gravamen of the respondent's contention was that the monies that were paid into the joint accounts were monies due to the company and therefore the appellants had misappropriated the company's monies.

[27] The respondent further alleged that, 'In furtherance of the misappropriations …' the first appellant purported to pass certain directors' resolutions of the company that were only signed by him alone. Among these resolutions was one dated 16 September 2018, which purported to resolve as follows:

KIEN YIAP TRADING SDN. BHD. (240078-a)

(Incorporated in Malaysia)

Directors' Resolution In Writing Passed Pursuant To Article 90 Of Constitution ("Articles Of Association")

Resolved:

THAT it is hereby agreed to accept the use of Madam Low Nang Hiang and Mr Lee Kai Wuen's joint bank account bearing account number 149-300-086-7 opened with Messrs United Overseas Bank (M) Berhad of Kluang Branch, Johor to bear all the Company's expenses and overheads for the time being until further notice.

It was noted that all of the Company's current account's banking signatory was authorised to be signed solely by the late Mr. Lee Poh Sin. The company's operations has been halted as no instructions were given to the relevant Banks for the change of bank signatories, therefore, the Director, namely Mr. Lee Kai Wuen, has offered his own personal joint account for the above purpose so as not to disrupt the Company's operations until further decisions can be made.

Board Of Directors

(signed)

… ...

Late Mr. Lee Poh Sin Lee Kai Wuen

Dated this 15th day of September, 2018

[28] This resolution passed was considered invalid by the respondent upon legal advice obtained. The respondent also maintained that this resolution, even if valid, did not authorise payments into the joint accounts by means of cheques in the name of the second appellant or cash to the first appellant. It was the respondent's contention that even if such an arrangement was intended, an extraordinary general meeting of the company could and should have been called for to regularise matters. Without having done so it was contended that such, 'could not be regarded as the "best accounting practices" in any sense'.

[29] It was contended by the respondent that the first appellant then caused one Luah Aik Chiew, who was the company's secretary, to prepare the necessary paperwork to appoint the second appellant as a director of the company.

[30] In her affidavit, the respondent conceded that documentation was also prepared for her appointment as a director of the company, but she declined. In her own words in para. 16.1 of her affidavit of 11 February 2019, the respondent stated 'Although the same documents also seek to jointly appoint me as a director, the resulted effect (*sic*) is that I will be outvoted by 2 to 1 in directors' meetings.'

[31] As for the proposal to appoint the second appellant as director, it was the respondent's contention that given the allegation that the second appellant herself had misappropriated monies belonging to the company, the second appellant would be unlikely to act in the interest of the company.

[32] Subsequently however, on 11 December 2018, the respondent issued a notice to requisition an extraordinary general meeting of the company. At this point in time the respondent was still only holding 29% of the issued share capital of the company. The deceased's shares in the company that were bequeathed to her and the first appellant were pending transfer and had, as yet not been transferred to her. In this notice, the respondent's proposed resolution was:

> That Lee Yee Wuen (NRIC No.: 750220-01-5494) is hereby appointed as a director of the Company with immediate effect.

The respondent was thus seeking to be appointed as a director of the company with immediate effect. Stated in para. 3 of the respondent's notice was, 'The general nature of the business to be dealt with at the meeting is on the appointment of a director'.

[33] By way of a notice dated 21 December 2018, an extraordinary general meeting was called for to be held on 15 January 2019 and the agenda stated was as follows:

AGENDA

1) To discuss the appointment of Lee Yee Wuen as Director of the Company;

2) To discuss the appointment of Low Nang Hiang as Director of the Company; and

3) To discuss the Company's management matters.

[34] On 15 January 2019, the appointed date for the extraordinary general meeting, the first appellant failed to attend and the meeting could not be held due to a lack of quorum.

[35] By reason of the appellants' alleged lack of probity and misappropriation of monies due to the company, the respondent was concerned that the appellants may dissipate their assets and thus defeat any judgment that the respondent might ultimately secure for the return of the monies misappropriated from the company.

[36] In this regard, the reliefs sought by the respondent in the originating summons, which included restitution of a sum of RM3,412,829.41 to the company, were the following:

A. The 1st and/or 2nd Defendants shall be jointly and severally liable to pay to the 3rd Defendant the total sum of RM3,412,829.41 wrongly paid to the 1st and/or 2nd Defendants.

B. Apart from the sum stated in Prayer (A) above, the 1st and/or 2nd Defendants shall pay to the 3rd Defendant any other sums, which are rightly belonged to the 3rd Defendant but are wrongly paid and/or held by the 1st and/or 2nd Defendants.

C. Pursuant to Section 314 of the Companies Act 2016, an Extraordinary General Meeting of the 3rd Defendant shall be held within 14 days of the Order, together with directions, declarations and/or orders that:

C.1 member of the 3rd Defendant present in person or by proxy at the meeting shall be deemed to constitute a quorum pursuant to Section 314(4) of the Companies Act 2016; and/or

C.2 Such other ancillary or consequential directions as this Honourable Court thinks expedient pursuant to Section 314(3) of the Companies Act 2016.

D. In the alternative to Prayer (C) above:

D.1 The 1st Defendant be removed as a director of the 3rd Defendant with immediate effect;

D.2 The 2nd Defendant be prohibited from being appointed, and/or taking any steps in any manner whatsoever to be appointed, as a director of the 3rd Defendant, or alternatively the 2nd Defendant be removed as a director of the 3rd Defendant, with immediate effect; and

D.3 The Plaintiff be appointed as a director of the 3rd Defendant with immediate effect.

E. Damages to be assessed and/or equitable compensation to be jointly and severally paid by the 1st and 2nd Defendants to the Plaintiff.

F. Costs of this application shall be jointly and severally paid by the 1st and 2nd Defendants to the Plaintiff.

G. The Plaintiff be at liberty to apply.

H. Any further and/or other relief which this Honourable Court deems just and reasonable to grant.

The Appellants' Case

[37] A good starting point in respect of the appellants' case is the fact that they do not deny payment of monies from the company's customers into the joint accounts, particulars of which were provided by the respondent.

[38] The first appellant, in his affidavit affirmed on 3 April 2019, in fact candidly volunteered that after carefully reviewing the company's records, there were actually twenty-eight payments received, totalling a sum of RM3,438,704.71, and not the lesser amount of RM3,412,829.41 maintained by the respondent. This arrangement for the payments that were made into the joint accounts, the first appellant contended, were with the knowledge and agreement of the respondent.

[39] The deceased, it seemed, was the sole authorised signatory of the company for its bank accounts. The first appellant averred in his affidavit that when the deceased fell into a coma on 27 August 2018, there was no one available to effect payments on behalf of the company for the latter's financial requirements and commitments.

[40] The first appellant explained that the company, which was founded by the deceased, grew over the years and had established various other companies and businesses that are connected to it. They were:

(i) Ladang Merlipan (Sabah) Sdn Bhd now known as Ladang Sri Harapan (Sabah) Sdn Bhd ('Ladang Sri Harapan');

(ii) Perfect Oil Resources (Sabah) Sdn Bhd ('Perfect Oil');

(iii) Maju Jaya Quarry Sdn Bhd ('Maju Jaya');

(iv) Sri Harapan FFB Collecting Centre Sdn Bhd;

(v) Tern Tat Red Bricks Manufacturer Sdn Bhd;

(vi) Soon Huat Timber Trading Co; and

(vii) Syarikat Kilang Papan Wira Sdn Bhd.

[41] It was contended that some of these companies enjoyed banking facilities and it appeared that from their facilities, loans were in turn granted to the company in respect of which there were repayments to be made by the company, by way of instalments. The company was also a guarantor for the loans to some of these related companies. Among them were Ladang Sri Harapan and Maju Jaya. Letters of offer from the banks were exhibited to corroborate. In fact, it was pointed out that the respondent herself is also one of three guarantors for borrowings by Ladang Sri Harapan (Sabah) Sdn Bhd from RHB Bank Berhad and RHB Islamic Bank Berhad.

[42] It was the appellants' case that when the deceased was still in a coma and there was no other authorised signatory to operate the company's bank accounts, the second appellant explained to the first appellant and the respondent that there was a need to maintain cash flow in the company. In order to do so, it was agreed by the appellants and the respondent that monies due from the customers of the company would be directed to the OCBC joint account. The OCBC joint account, being an account in the joint name of the

A deceased and the second appellant, either the deceased or the first appellant could operate that joint account. In this way, the monies due to the company when paid into the OCBC joint account, could be used by the second appellant to defray the expenses and meet the financial commitments of the company.

B **[43]** It was further contended that when the deceased passed away on 10 September 2018, the OCBC joint account was suspended or 'frozen'. No further payments could be made out of the OCBC joint account. An alternative account was therefore required to facilitate receiving monies due to the company in order to enable payments therefrom to be made to the C account and on behalf of the company. The first appellant averred that it was then agreed that monies due to the company from its customers would be paid into the OUB joint account.

[44] The first appellant also made clear that the OUB joint account was an existing joint account in the joint names of the appellants. It was not an D especial account opened in the name of the appellants for receiving monies of the company.

[45] The first appellant states that he was aware of the respondent's agreement to the arrangement to use the UOB joint account as he was present when the discussion took place between the second appellant and the E respondent. This was on the occasion of the reading of the deceased's will, on 21 September 2018 at Rockwills, Johor Bahru. The email from Rockwills Trustee Berhad to the respondent and the first appellant dated 18 September 2018 setting out the date, time and venue for the meeting was exhibited by the first appellant.

F **[46]** The reason the first appellant gave as to why his joint account with the second appellant was used was that the respondent was no longer residing in Kluang and in addition, she was not involved in the management of the company.

G **[47]** According to the appellants, the monies paid into the joint accounts were also utilised in the repayment of the loans from Ladang Sri Harapan and Maju Jaya. Records were kept and produced in respect of these payments in the form of payment vouchers with invoices.

[48] Also exhibited by the first appellant in his affidavit was the company's H general ledger. The general ledger records monies received from the company's customers and payments out to payees who are claimed to be the company's creditors/suppliers.

[49] It was therefore, the appellants' case that the joint accounts were used to receive monies due to the company, on behalf of the company, so that the I monies received could in turn be used to meet the company's financial

requirements and commitments. The alleged misappropriation by the appellants was thus categorically denied. This arrangement, the appellants maintained, was to the knowledge and with the agreement of the respondent.

[50] The appellants also stated that the *Mareva* injunction against them had put both their personal finances and those of the company, including its related companies, in jeopardy particularly those with loans and had repayments to make.

[51] The appellants also provided what was described as a cash summary pertaining to the company. Details with date, amounts paid, payees, etc were set out in this summary. Its tabulations demonstrated a total amount of RM2,827,882.68 being paid out to the account of the company, out of the RM3,438,704.71 received, with a balance of RM610,822.03 remaining of the company's money.

[52] Suffice it to say that the respondent, in her affidavit in reply, denies her alleged agreement with the arrangement to utilise the joint accounts in the manner described by the appellants.

[53] In para. 11 of her affidavit in reply, affirmed on 23 April 2018, although the respondent seems to deny knowledge of the arrangement to use the joint accounts, the subparagraphs to para. 11 and para. 12 seem to suggest the contrary. In the subparagraphs to para. 11, the respondent denied that she agreed with the arrangement and goes on to state that, 'My position **had always been** that monies due to D3 must be paid to its accounts' (emphasis added). In para. 12, the respondent speaks of 'concealment of my objection to their misappropriations'. These statements by the respondent seem to indicate that she was aware, or was informed, of the arrangement but had objected to it and had made her position clear.

[54] The respondent, in response, also asserted that the payments out of the joint accounts have not been accounted for. The respondent stated that the company's monthly payment in 2018 was only around RM115,790.75 per month and this was in stark contrast to the amount that was paid into the joint accounts.

[55] As for his failure to attend the extraordinary general meeting that was scheduled for 15 January 2019, the first appellant's response was that it was premature and unnecessary as the transfer of the deceased shares had not, as yet, taken place. The first appellant also alleged that he did not have the time to attend the meeting as he was struggling to keep the company operational and afloat.

Mareva Type Injunctions

[56] It is well settled that in order to be able to secure a *Mareva* type injunction, three vital ingredients must be established, namely (i) that the applicant has a good arguable case (ii) that the respondent/s has assets within

A the jurisdiction and (iii) that there is a real risk that the assets would be dissipated or placed beyond reach of the applicant, before judgment (See *S & F International Ltd v. Trans-Con Engineering Sdn Bhd* [1985] 2 CLJ 228; [1985] CLJ (Rep) 280; [1985] 1 MLJ 62; *Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft m.b.H. & Co KG; The Nidersachsen* [1984] 1 All
B ER 398; and *Creative Furnishing Sdn Bhd v. Wong Koi* [1989] 2 CLJ 93; [1989] 1 CLJ (Rep) 22; [1989] 2 MLJ 153).

[57] As succinctly put by Parker LJ in *Derby & Co Ltd v. Weldon* [1990] Ch 48 at p. 57:

C
> There are in essence only three issues; (i) has the plaintiff a good arguable case; (ii) has the plaintiff satisfied the court that there are assets within and, where an extraterritorial order is sought, without the jurisdiction; and (iii) is there a real risk of dissipation or secretion of assets so as to render any judgment which the plaintiff may obtain nugatory.

[58] Counsel for the parties did not have any dispute as to these ingredients
D necessary for the issue of a *Mareva* injunction. However, there was disagreement as to what it might take to establish one of these essential ingredients.

[59] There has also been a suggestion, and often an assumption, in some reported decisions of our courts, that there is a fourth criteria for the grant
E of a *Mareva* injunction. That fourth criterion is the need to demonstrate or establish that the balance of convenience must lie in favour of granting the *Mareva* injunction sought. This point was not pursued by the parties in this appeal and it will thus only be dealt with in passing as to whether there in fact exists this criterion.

F
[60] That the appellants have assets within the jurisdiction was not a fact in dispute. The main ingredients that gave rise to serious contentions were whether there exists a good arguable case in favour of the respondent and whether there was a real risk that the appellants would dissipate or dispose of their assets to defeat any judgment that may be entered in the respondent's
G favour. In addition, for the purposes of the appeal, there were also several other arguments of a procedural nature raised by the appellants.

A Good Arguable Case

[61] As the learned judge quite rightly pointed out, in order to establish a
H good arguable case, it was not necessary that the applicant's case has to have a better than 50% chance of success, although it has to be more than barely capable of serious argument. In the words of Mustill J in *Ninemia Maritime Corporation* at p. 404 of the report above-cited, which was reiterated by the Federal Court in *S & F International Limited* at p. 64:

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> …, I consider the right course is to adopt the tests of a good arguable case, in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success.

[62] In the decision of this court in *Biasamas Sdn Bhd & Ors v. Kan Yan Heng & Anor* [1998] 4 CLJ 754; [1998] 4 MLJ 1 at p. 759 (CLJ); p. 5 (MLJ), Haidar Mohd Noor JCA delivering the judgment of the court used the phrase, 'a fair chance' of success. This was how Haidar Mohd Noor JCA put it:

> What is a good arguable case is difficult to define. The respondents need not show that they have a case so strong as to warrant summary judgment nor even a strong *prima facie* case. *It would generally be sufficient if the respondents can show on the evidence available, there is a fair chance that they will obtain judgment against the appellants (see Ninemia Maritime Corp v. Trave Schiffahrtsgesellschaft mbH & Co KG; The Niedersachsen* [1984] 1 All ER 398, on appeal to CA [1984] 1 All ER 413; [1983] 1 WLR 1412).
>
> (emphasis added)

[63] In our view, it is firstly quite significant that the payments into the joint accounts were never denied by the appellants. In fact, it was the appellants who pointed out that the total amount paid into the joint accounts were more than the amount stated by the respondent.

[64] It was also not disputed that the deceased was the sole signatory to the banking account of the company and there were only two directors at the material time, namely the deceased and the first appellant.

[65] Based on the details provided by the respondent, payments were made by the company's customers into the OCBC joint account on the 4 and 5 September 2018. It is not disputed that the deceased fell into a coma on the 27 August 2018. Thus, these payments were made about a week after the deceased went into a coma. The sole signatory for the company's bank accounts being incapacitated, clearly, there could be no payments made out of the company's bank accounts. All things being equal, this would obviously be a financially perilous state for the company to be in.

[66] The OCBC joint account was an existing joint account in the names of both the deceased and the second appellant. They were the parents of the respondent and the first appellant in a company whose shares were owned by the deceased, the first appellant and the respondent. It thus does not seem extraordinary that this joint account was used in order to facilitate the receipt of the company's monies and to make payments therefrom, to the account of the company to meet its financial obligations.

A **[67]** Therefore, it would seem consistent with the appellants' case that by the use of the OCBC joint account, the second appellant was thus in a position to make payments on behalf of the company and hence monies from the company's customers were directed to be paid into this OCBC joint account. This arrangement would enable the company to meet its financial
B obligations.

[68] Also based on the respondent's affidavit, payments into the UOB joint account began subsequently on 19 September 2018 onwards to the 8 December 2018. This was after the deceased had passed away on 10 September 2018. As the first appellant explained, it was necessary to use
C the UOB joint account as the OCBC joint account with the deceased was suspended or 'frozen' by the bank upon the demise of the deceased.

[69] That the company had periodical financial obligations to meet was clearly demonstrated by the appellants. Although the amount of the company's financial commitments was disputed, there was nevertheless no
D claim by the respondent that she herself, or anyone else, had paid or had met any of the company's financial commitments. It would therefore seem more likely than not, that the financial commitments of the company, at least some of them, were met by the appellants with monies from the joint accounts as contended by them.

E **[70]** Indeed, there were documentary evidence of payments in the form of statements and vouchers produced which demonstrated that there were payments made to the account of the company, out of the joint accounts.

[71] There does not appear to have been any attempt by the appellants to
F conceal the payments of the allegedly misappropriated monies into the joint accounts. In fact, the payments were documented. Again, reference may be made to the statements, banking in slips, cheques and the general ledger of the company that were produced in evidence. These were records kept of the payments. In this regard, there were also obviously records of the payments
G made into the joint accounts from the company's customers from which details thereof could have been obtained by the respondent and provided in her affidavit in support of the originating summons.

[72] As for the resolution of 15 September 2018, regard perhaps should have been given to the fact that there was only one director at that material
H time and that was the first appellant.

[73] In addition, and as the respondent herself acknowledged, documents were prepared for her to be appointed as a director but she declined. There was also an attempt to appoint the second appellant as a director, but this was objected to by the respondent. Thus, at the board level, by reason of the
I respondent's objections, the company was locked in an unprecedented state

of having only one director. It was only subsequently on 11 December 2018, that the respondent, in a volte-face, issued a notice seeking an extraordinary general meeting with a proposal to be appointed onto the board.

[74] In the meantime, it is not inconceivable that all the first appellant could do, as the sole director in September of 2018, was to pass a board resolution with him as the sole director executing the same. For the avoidance of any doubt, this is not a determination by this court as to the validity of the resolution of 15 September 2018 as this is a matter that would have to be determined by the High Court after a hearing on the merits of the application. It is however a factor to be considered as to whether there was any attempt to conceal any wrongful act of misappropriation or whether the arrangement was with a *bona fide* intention to facilitate and enable payments to be made on behalf of the company and to protect the company's interests.

[75] The learned judge concluded that the respondent had, in this case, established the requirement of a good arguable case.

[76] The learned judge doubted the contention that the arrangement for monies due to the company to be paid into the joint accounts, was put in place in order to meet the financial requirements of the company due to the illness and demise of the deceased or that the arrangement had the agreement of the respondent. It was queried that if such were the case, the arrangement should have been temporary and not continued until December 2018. The learned judge also formed the view that the assertion that the respondent had agreed to the arrangement was merely a bare allegation.

[77] In addition, the learned judge was also of the view that the resolution of 15 September 2018 was in breach of the company's articles and even so, the resolution was only for the UOB joint account and not the OCBC joint account.

[78] The learned judge concluded that the company's monthly commitments were only around RM115,790.75 and this amount was in stark contrast to the amount of monies diverted into the joint accounts. Although the appellants contended that they had paid out to the account of the company a total sum of RM4,048,383.27, which was RM635,553.86 in excess of the total sum of RM3,412,829.41, the learned judge held that that was a matter in dispute that ought to be dealt with in another suit, namely Suit JA-22NCC-30-06-2020 ('Suit 30').

[79] Suit 30 is a suit brought by the company against the first appellant for breaches of directors' duties and against the second appellant for dishonest receipt and knowing receipt. Having considered the respondent's contentions, and a table produced, the learned judge concluded that the disputed payments amounted to a sum of RM818,779.75. In the grounds of judgment, it was stated thus:

> Secondly, from what the Plaintiff has been able to review, it was able to dispute the payments which it set out in its paragraph 7.1 to 7.11, enclosure 126. These were reduced into a table as shown in its supplemental submission dated 17-8-2020. **The disputed payments came up to RM818,779.75. It cannot therefore be said that the payment of the RM4 million plus can negate the Plaintiff's good arguable case.** (emphasis added)

However, we note that if this be the case, ought not the *Mareva* injunction granted be only for this amount of RM818,779.75 that was disputed?

[80] We are however reminded of the caution by Eusoffe Abdoolcader FJ in *S & F International Limited*, at p. 283 (CLJ); p. 64 (MLJ) of the report:

> **We should perhaps also reiterate and stress the point that the discretion whether or not to grant an interlocutory injunction is vested in the High Court Judge and not the appellate court** whose function initially is one of review only, and it will not overrule the decision of the judge at first instance unless, broadly speaking, he has made an error of law or misconceived the facts, and except in those circumstances it must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently: *Duport Steels Ltd. v. Sirs* (6); *Hadmor Productions Ltd. v. Hamilton* (7); *Garden Cottage Foods Ltd. v. Milk Marketing Board* (8). These decisions of the House of Lords were referred to and applied by the English Court of Appeal in *Ninemia Maritime Corporation* [1983] 1 WLR at p. 1421; [1984) 1 All ER at p. 418) where Kerr, LJ, in delivering the judgment of the court stated that recent decisions of the House have **emphasised the importance of appellate courts resisting the temptation to interfere with the exercise of judicial discretions other than in limited circumstances.** (emphasis added)

[81] Whatever the intention might be, unless lawfully authorised, directors cannot divert the company's funds to their personal account. That the learned judge had, in the circumstances of the case, serious doubts that all monies due to the company that were caused to be paid into the joint accounts were used for the benefit of the company, entitled the learned judge to hold that the respondent had a good arguable case. The respondent's case was 'more than barely capable of serious argument'.

[82] The conclusion of the learned judge was, in addition, further supported by the decision of the Court of Appeal in *Lee Yee Wuen v. Lee Kai Wuen & Ors* [2020] 1 LNS 1676; [2020] MLJU 1902, that the court's discretion and power under s. 346(2) of the Companies Act 2016 is wide enough to encompass an order for restitution of monies misappropriated from a company. The appeal arose out of this very same originating summons before us. The appellants had applied to strike out certain prayers in the originating summons. The application was allowed by the learned

judge in the High Court. However, on appeal, this court set aside the learned judge's decision and reinstated the reliefs sought that were struck out. Suffice to say, that this court had found that the reliefs in the instant originating summons sought to be struck out were not plainly unsustainable.

[83] In addition, in respect of misappropriation *vis-a-vis* oppression in a company, S Nantha Balan JCA, in delivering the decision of this court in *Lee Yee Wuen* observed that:

> [66] It is trite that misappropriation of monies can constitute an act of oppression. This is demonstrated by the case of *Chiew Sze Sun v. Cast Iron Products Sdn Bhd* [1994] 1 CLJ 157; [1993] MLJU 115; [1993] 2 AMR 3174 HC ("*Cast Iron Products*") where Zakaria Yatim J allowed an oppression claim premised on *inter alia* misappropriation of company funds by the directors.

Also cited by way of an example by His Lordship was the decision in *Oon Ah Baa & Ors v. Eagle & Pagoda Brand Teck Aun Medical Factory Sdn Bhd & Ors (No 2)* [2003] 1 LNS 537; [2004] 2 MLJ 340; [2004] 5 AMR 485 HC.

[84] Clearly however, whether misappropriation of company funds may be tantamount to oppression within the ambit of s. 346 of the Companies Act 2016 is necessarily fact sensitive and subject to the circumstances in each case. We do not think that the decision in *Lee Yee Wuen* was intended to establish a proposition that mere misappropriation *per se* and without more, is tantamount to oppression.

Real Risk Of Dissipation Of Assets

[85] There was, however, no direct evidence led of any risk that the appellants might dispose or dissipate their assets or put their assets beyond the reach of the respondent, should she succeed in securing the reliefs sought.

[86] By direct evidence we mean no evidence of any actual attempt by either or both of the appellants to dissipate any of their assets or any instance of any actual dissipation of either appellant's assets.

[87] The learned judge was no doubt cognisant of this fact when in the learned judge's grounds of judgment, after referring to authorities to the effect that there must be evidence of risk of dissipation of assets, it was stated thus:

> [30] As against the above, there are also cases of high authority where if there is misappropriation, dishonesty or lack of probity, the **risk of dissipation of assets can be presumed.** (emphasis added)

[88] Reference was then made to a passage in the judgment of Abdul Malik Ishak J in *Pharmmalaysia Bhd v. Dinesh Kumar Jashbhai Nagjibha Patel & Ors* [2004] 7 CLJ 465 at 550 in which His Lordship stated:

A That it was not necessary for the plaintiff to show actual evidence of risk of dissipation of the assets. **The risk of dissipation would be something that must necessarily be inferred from the circumstances of the case** including the circumstances wherein the funds in question were received by the parties concerned. (emphasis added)

B **[89]** The above passage cited from the judgment in *Pharmmalaysia Bhd* in fact pointed to risk of dissipation of assets, '… that must necessarily be inferred from the circumstances of the case …' – rather than presumed.

[90] Also referred to were passages in the judgment of Kang Hwee Gee J in *Multi-Code Electronics Industries (M) Bhd & Anor v. Gordon Toh Chun Toh*
C *& Ors* [2009] 9 CLJ 659 at p. 685. They were as follows:

"… where a *prima facie* case of dishonesty involving diversion of money from its proper channels" is made out, "this would justify the conclusion that there was a danger that the appellant would dispose of the assets in order to defeat the judgment."

D There could be no question that the monies were withdrawn dishonestly for they were withdrawn without the authority of the Board. The risk of dissipation must be presumed under the circumstances.

[91] Also referred to by the learned judge were the following passages in the judgment of Vazeer Alam Mydin J in *Dopag Dosiertechnik und Pneumatik*
E *AG v. Gamel Nasir Taib & Ors* [2017] 5 CLJ 727; [2017] 10 MLJ 31:

In any event, the risk of **dissipation of assets can clearly be presumed from the first and second defendants lack of probity and dishonest conduct** in dealing with the assets of the company …

F The law is clear that where there is a **lack of probity on the part of the defendants, the court may assume that there is such risk of dissipation.** Such lack of probity may arise when monies are withdrawn or paid out without proper authority, …

The **conduct of the first and second defendants in bringing about large losses to the fifth defendant, which arose from their blatant disregard and**
G **breach of statutory and fiduciary duties owed to the fifth defendant.** Large sums of monies belonging to the fifth defendant were paid out unlawfully to both the first and second defendants. These unlawful conduct of the first and second defendants fortifies the plaintiff's contention that there is apparent risk of assets being dissipated. (emphasis added)

H **[92]** As to what it takes to demonstrate a real risk of dissipation of assets, Mustill J in *Ninemia Maritime Corporation* stated as follows:

Nevertheless, certain themes can be seen to run through the cases. *It is not enough for the plaintiff to assert a risk that the assets will be dissipated. He must demonstrate this by solid evidence. This evidence may take a number of different*
I *forms. It may consist of direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on.* Or the plaintiff may show what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) *so as to raise an*

> *inference that the company is not to be relied on.* Or, again, the plaintiff may be able to found his case on the fact that inquiries about the characteristics of the defendant have led to a blank wall. *Precisely what form the evidence may take will depend on the particular circumstances of the case. But the evidence must always be there.* (emphasis added)

These observations by Mustill J in were reiterated by Eusoffe Abdoolcader FJ in *S & F International Limited* and clearly adopted by the Federal Court in that case.

[93] Thus, there must either be direct evidence of a real risk of dissipation of assets or circumstances in evidence that warrants an inference of such a risk. As Mustill J stated, and it bears repeating, 'Precisely what form the evidence may take will depend on the particular circumstances of the case. **But the evidence must always be there**' (emphasis added). It must also be emphasised that the ingredient in question is not merely the risk of dissipation of assets, but a 'real risk'. The adjective used is in our view, not without significance. It lends to emphasise that a mere risk would not do. If it were otherwise, based merely on arguable allegations, at an interlocutory stage, a great majority of cases would qualify for a *Mareva* injunction. In the face of unproven allegations, such a consequence would clearly be oppressive. It merits noting that the *Mareva* injunction, together with the *Anton Piller* type injunction, were described by Donaldson LJ in *Bank Mellat v. Nikpour* [1985] FSR 87 at p. 92, as nuclear weapons of the law. The effect of these types of injunctions can be very harsh and oppressive and it is not inconceivable that in certain cases, they may have ruinous consequences.

[94] The need for evidence of a real risk of dissipation of assets was also central to the decision of the Federal Court in *Zainal Abidin Hj Abdul Rahman v. Century Hotel Sdn Bhd* [1982] 1 LNS 34; [1982] 1 MLJ 260, where His Royal Highness, Raja Azlan Shah CJ (Malaya) stated in respect of a *Mareva* injunction at p. 264:

> The appellant still has to establish the second requirement, that is in order to gain the particular form of protection sought by the injunction *he must show that there is a danger that the company's available assets will be dissipated to prejudice the appellant's claim. That is a matter of evidence.* (emphasis added)

The decision of the Federal Court in that case was ultimately to dismiss the appeal against the decision of the High Court in refusing to grant a *Mareva* injunction sought. It was held that although the appellant had raised a serious question to be tried, there was no evidence to demonstrate that there was a danger that the available assets of the respondent would be dissipated, to the prejudice of the appellant's claim.

[95] The Federal Court also stressed, of the court's jurisdiction to grant a *Mareva* injunction, in the following terms:

A **It must not be debased into something invoked to obtain security for a judgment in advance, or pressuring a defendant into a settlement.** "The courts must be vigilant to ensure that a *Mareva* defendant is not treated like a judgment debtor" (see *A.J. Bekhor & Co. Ltd. v. Bilton* (*supra* – [1981] 2 All ER 577)). It is consequently not accurate to refer to a *Mareva* injunction as a pre-trial attachment (see *Cretanor Maritime Co Ltd v. Irish* B *Maritime Management Ltd* [1978] 1 Lloyd's Rep 425). (emphasis added)

[96] In a *Mareva* type of injunction, the injunction is directed at the assets of the defendant and which assets are not necessarily the subject matter, in specie, of the plaintiff's claim. The assets precluded from disposal are often the personal assets of the defendants. As Mustill J pointed out in *Ninemia* C *Maritime Corporation*, at p. 403:

> The relief granted on a *Mareva* application is of a quite different character. It bears no relation to the relief granted at trial. The plaintiff, however successful at the trial, will not obtain a perpetual injunction in terms of the interlocutory *Mareva* injunction. **The latter bears on assets which in** D **the great majority of cases have no connection at all with the cause of action on which the injunction is founded.** (emphasis added)

[97] The need for evidence of a real risk of dissipation in fact lies at the very heart of the jurisdiction and its *raison d'etre*. The sole purpose of a *Mareva* injunction, as Eusoffe Abdoolcader pointed out in *S & F International* E *Limited*, referring to the decision in *PCW (Underwriting Agencies) Ltd v. Dixon & Anor* [1983] 2 All ER 158 was:

> *… the sole purpose of a Mareva injunction was to prevent a plaintiff being cheated out of the proceeds of an action, should he be successful, by a defendant transferring his assets abroad or dissipating his assets within the jurisdiction,* and that the F remedy was not intended to give a plaintiff priority over those assets, or to prevent a defendant from paying his debts as they fell due, or to punish him for his alleged misdeeds, or to enable a plaintiff to exert pressure on him to settle an action. (emphasis added)

[98] To hold that a real risk of dissipation of assets may be presumed is G effectively to negate the need to actually establish that such a risk exists. This, in our view, would be inconsistent with all the settled authorities that a real risk of dissipation is an essential ingredient. This requirement necessarily means it is an issue that has to be established and in legal proceedings, that can only be achieved by means of evidence. The binding H authorities of our courts do not in fact establish that there exists any exception to the rule, such that this ingredient may be presumed in any identified circumstance.

[99] What the authorities do establish, and none so clearly as in the decision in *Ninemia Maritime Corporation* which was expressly quoted by the I Federal Court in *S & F International Ltd*, and thus a decision binding on this court, is that there must be evidence of a real risk of dissipation of assets – whether direct evidence or an inference that may properly be drawn from

evidence that is led and provided. It may not be presumed, particularly at an interlocutory stage, when allegations made of impropriety have yet to be proved. If, however, want of probity or misconduct is so clearly established, even at the interlocutory stage, then, depending on the nature of the lack of probity or misconduct, a real risk of dissipation of assets may be **inferred** – not **presumed**. (emphasis added)

[100] As for allegations of misappropriation, dishonesty or lack of probity, it is a matter of common sense that even if there exists evidence of these allegations, they must also be of a nature that has a real and material bearing on, or of a nature that can justify an inference of, a real risk of dissipation of assets (see *Bouvier, Yves Charles Edgar And Another v. Accent Delight International Ltd And Another And Another Appeal* [2015] SGCA 45; [2015] 5 SLR 558). Mere allegations of these nature, even with some evidence in support of these allegations, would not *per se* warrant a presumption or inference that there exists a real risk of dissipation of assets.

[101] As mentioned, there was no direct evidence of any such risk of dissipation by both appellants of their assets. How the learned judge came to a conclusion on this issue is set out in the grounds of judgment thus:

> [31] Given that the Court had earlier found a good and arguable case for misappropriation, appointment of the 2nd Defendant as not being in the best interest and that the 1st Defendant had breached his director's duty in not convening an EGM, these were acts which the Court could **take into account in presuming a real risk of dissipation.** (emphasis added)

[102] The reasoning disclosed in this paragraph of the grounds of judgment in fact suggests a process in which the learned judge had inferred from the 'acts' referred to, rather than presumed, that there exists a real risk of dissipation.

[103] However, we are of the view that to infer a real risk of dissipation merely because a good arguable case has been made out is a step too far. This would be tantamount to conflating the two separate required ingredients into one. As can be seen in the case of *Century Hotel Sdn Bhd*, even though a good arguable case was established, the Federal Court still required that there be evidence of the danger of dissipation of assets. In *Bouvier*, even though a good arguable case of dishonesty was established, the Court of Appeal of Singapore held that the allegations of dishonesty in that case did not have a real and material bearing upon the risk of dissipation.

[104] Significantly, in the circumstances of this case, there was no apparent attempt at concealment by the appellants of the payments into the joint accounts or their utilisation. The fact that the company had financial

A obligations and that there was evidence of payments made out of the joint accounts to the account of the company were not evidence of lack of probity or impropriety or misappropriation. The board resolution of 15 September 2018, the validity of which is being challenged, was nevertheless an unconcealed disclosure of the intention to fund the company's financial
B requirements and commitments by the use of an alternative bank account.

[105] That there was a need to use the joint accounts was corroborated by the fact that the deceased was the only signatory for the company and the arrangement was only put in place after the deceased had fell into a coma, leading to his subsequent demise. This was when the first appellant had found
C himself to be the only director, without any means to effect payments to meet the company's financial obligations. This too was compounded by the fact that it was the respondent who, at that material time, refused to be appointed director and objected to the second appellant's appointment as a director.

[106] It needs also be noted that these events took place in respect of a
D company whose members were immediate family members. The deceased, as the father, was running the company with his son, the first appellant. They were the only two directors. Also involved was the second appellant, mother to the first appellant and the respondent. It is hardly disputable that both the appellants were confronted with an unprecedented event, upon the collapse
E of the deceased, followed by his subsequent demise.

[107] That the appellants were trying to facilitate meeting the company's financial obligations rather than to misappropriate its funds for the appellants' own use is not, in the circumstances of the case, and in our view, obviously unsustainable. How else was the company to meet its financial
F commitments? Equally too, the appellants' assertion that the respondent had agreed to the arrangement. At this stage of the proceedings, this may appear to be a bare assertion, but so too the respondent's denial.

[108] To an extent, the variation order of 6 March 2019 could be viewed as an implied acknowledgement that there were payments that had to be
G made by the company and if the bank accounts of the company are suspended, surely these payments would have had to be made out of some other operable bank account. In fact, no alternative suggestion had been made by the respondent as to how the financial commitments of the company could have been met, without the deployment of the arrangement by the
H appellants. The complaint seems to be that this arrangement should have been put to the shareholders of the company for their approval, in a general meeting.

[109] While it is no excuse to ignore principles of company law, and while there may be a good arguable case that there were breaches of the law, they
I were not of a nature that warranted any necessary inference that the

appellants would dissipate their assets to avoid honouring any judgment for restitution of the monies paid into the joint account, if ultimately granted by the court.

[110] Equally important is the fact that there was no evidence that the appellants or either of them had misappropriated the monies transferred into the joint accounts, for their own benefit. While there were repetitive assertions of misappropriation, no evidence or particulars were ever provided of the allegation, how much was misappropriated by the appellants to their own use rather than paid out to the account of the company in the discharge of its financial obligations. In this regard, the learned judge's grounds of judgment clearly demonstrated a finding that monies were in fact paid out of the joint accounts to the account of the company leaving a portion that was disputed. In para. [19] of the grounds of judgment, the learned judge stated thus:

> [19] The Defendant's further affidavit in enclosure 114 was to show that out of the RM3,412,829.41 from the Company's funds, the 1st and 2nd Defendant had paid RM4,048,383.27 in the Company's favour. This was an over payment of RM635,048.86. These have been challenged by the Plaintiff as firstly there is now a suit JA-22NCC-30-06-2020 … . Secondly, from what the Plaintiff has been able to review, it was able to dispute the payments which it set out in its paragraph 7.1 to 7.11, enclosure 126. These were reduced into a table as shown in its supplemental submission dated 17-8-2020. **The disputed payments came up to RM818,779.75. It cannot therefore be said that the payment of the RM4 million plus can negate the Plaintiff's good arguable case.** (emphasis added)

[111] We would therefore conclude that in our view, the learned judge had erred in presuming or in inferring that there was a real risk of dissipation of assets by the appellants or either of them, upon the evidence adduced and in the circumstances of this case. This vital ingredient that needs to be established before a *Mareva* type injunction may issue, was not, in our view, established.

Balance Of Convenience

[112] There have been continuing reports of cases that have made reference to the issue of balance of convenience, both by counsel and also in some cases by the court, in regard to applications for a *Mareva* injunction see *eg*, *Bumi Armada Navigation Sdn Bhd v. Mirza Marine Sdn Bhd* [2015] 5 CLJ 652, *Metrowangsa Asset Management Sdn Bhd & Anor v. Ahmad Hj Hassan & Ors* [2004] 1 LNS 699; [2005] 1 MLJ 654; *Ananda Kumar Krishnan v. LS Fishery Sdn Bhd & Ors* [2021] 1 LNS 641; *EHQ Projects Sdn Bhd & Ors v. Equipro Sdn Bhd & Ors* [2008] 7 CLJ 343; *Bright Rims Manufacturing Sdn Bhd v. Victor Taichung Machinery Works Co Ltd & Anor* [2007] 4 CLJ 230; and *Dynasty Rangers (M) Sdn Bhd v. SBSK Plantations Sdn Bhd* [2001] 7 CLJ 168; [2001] 1 MLJU 439.

[113] In *Tsoi Ping Kwan v. Loh Lai Ngoh & Anor* [1997] 3 CLJ 552 at pp. 554 and 556, Gopal Sri Ram JCA delivering the judgment of this court stated as follows:

> There are several issues upon which the disputants before us stand in disagreement. However, we find it necessary to deal with only two of them. … **The second relates to the question where the balance of convenience or, more appropriately, the balance of justice lies. In other words, whether justice favours the grant of a *Mareva* or its refusal. …**
>
> **Turning to the second issue, it is to be noted that the learned Judge, after weighting all relevant factors came to the conclusion that the balance of convenience lay in favour of refusing a *Mareva*.** He said:
>
> > Damages are an adequate remedy to the plaintiff as he will be in a position to quantify his claim in money terms if it is found at trial that the 1st defendant was a constructive trustee of his shares. However, the 2nd defendant will be immobilised by the injunction and the damages suffered will not be readily quantifiable. As such damages will not be an adequate remedy to the 2nd defendant and the balance of convenience lies in favour of refusing the injunction. (emphasis added)

[114] The appeal before the court in *Tsoi Ping Kwan* was one against the refusal by the High Court to grant a *Mareva* injunction. Although the appeal was dismissed, it was dismissed on the ground that the learned judge had rightly exercised his discretion in refusing to grant the *Mareva* injunction sought, having concluded that the balance of convenience was against the grant of the *Mareva* injunction. However, from the passage quoted from the decision of the High Court, it would appear that the decision of the High Court was based not only upon a balance of convenience but also on a conclusion that damages was an adequate remedy; in other words, the plaintiff would not suffer any irreparable damage should the *Mareva* injunction be refused. The requirement of irreparable damage is yet another factor that would in our view, and with respect, be regarded as being alien to the grant of a *Mareva* type of injunction for the reasons addressed above.

[115] It would seem to us that in all these cases where the balance of convenience *vis-a-vis* the grant of a *Mareva* injunction was considered, arose from, with respect, an error in conflating the requirements for the grant of non *Mareva* type interlocutory injunctions, with *Mareva* injunctions properly so called.

[116] The balance of convenience is a legal consideration of some antiquity. In *Mitchell v. Henry* (1880) 15 Ch D 181, at pp. 191 and 192, a case involving an allegation of a trade mark infringement, James LJ had regard to the balance of convenience and dealt with it as follows in an application for an interlocutory injunction:

> *Then with regard to the balance of convenience and inconvenience, it seems to me by far the most convenient course that no injunction should be granted, and that the motion should stand over to the hearing, the Defendants undertaking to keep an account.* The Plaintiffs can protect themselves, as they have to a great extent already done, by circular. Moreover, the pendency of these proceedings will be perfectly well known. Every large purchaser in Bradford or elsewhere will know of them, and will know that he will incur liability if he makes himself a party to any continued infringement of the Plaintiffs' rights, should those rights be established at the hearing. If that should be the result of the action the Defendants who undertake to keep an account will be liable to pay to the Plaintiffs every farthing of the profits they make by the sale of goods by which the Plaintiffs' mark is infringed, and will find themselves in this position, that they will have been using a trade-mark which they will be prevented from using afterwards, and so will lose all the reputation they have been acquiring in the meantime. Then again the Plaintiffs will be relieved from the necessity of giving an undertaking to abide by any order as to damages if the Defendants should prove successful at the hearing. *Therefore on the balance of convenience and inconvenience, and having regard to the fact that the decision of the Master of the Rolls was in favour of the Defendants, which ought not to be overlooked on an interlocutory application, I am of opinion that the better way will be to let the motion stand till the hearing, the Defendants keeping an account.* We must discharge the order of the Master of the Rolls, and make the costs of both parties costs in the action. (emphasis added)

[117] In *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396, Lord Diplock's employment of this consideration was predicated on the following, as His Lordship explained in p. 406 of the report:

> My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when *ex hypothesi* the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; *but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the*

A *plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial.* The court must weigh one need against another and determine where "the balance of convenience" lies. (emphasis added)

[118] However, the interlocutory injunctions that Lord Diplock was dealing with was not of a *Mareva* type of injunction (See also the decision of this court B in *Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 193). The interlocutory injunction that Lord Diplock was concerned with in *American Cyanamid* was, in interlocutory form, an injunction that a plaintiff was entitled to as a relief based on a pleaded cause of action. As Lord Diplock stated in *Siskina (Owners of Cargo Lately Laden on* C *Board) v. Distos Compania Naviera SA* [1979] AC 210 at p. 249, 'The distinction drawn by the appellants between an interlocutory and final injunction is merely a matter of form. There must be some underlying cause of action to enable the court to grant an injunction. If no such right is established then neither type of injunction can be ordered'.

D **[119]** As has already been pointed out, a *Mareva* injunction is an injunction of quite a different character. It is not the final remedy sought in a cause. Although relevant to, it bears no dependence on, the final relief that is sought in an action (see statement by Mustill J in *Ninemia Maritime Corporation*, *supra*). In none of the authoritative cases in which the *Mareva* injunction was E introduced was it ever stated or required that the balance of convenience is a criterion to be met (see *Zainal Abidin Hj Abdul Rahman v. Century Hotel Sdn Bhd* [1982] 1 LNS 34; [1982] 1 MLJ 260; *Nippon Yusen Kaisha v. Karageorgis* [1975] 1 WLR 1093; *Mareva Compania Naviera SA v. International Bulkcarriers SA* [1975] 2 Lloyd's Rep. 509 and *Rasu Maritima SA v. Perusahaan* F *Pertambangan Minyak Dan Gas Bumi Negara; Government Of The Republic Of Indonesia Intervening* [1977] 3 WLR 518).

[120] The jurisdiction exercised by courts in the grant of *Mareva* injunctions is one to prevent an abuse of the legal process in cases where there is a real risk that a litigant facing potential liability may seek to render any judgment G that may finally be entered against him impotent by dissipating or disposing his assets.

[121] Where it is demonstrated that such a risk exists, we do not see any room for a consideration of the balance of convenience. Seeking to defeat a judgment of the court in such a fashion cannot be countenanced by any H inconvenience that may be proffered. It is therefore important to distinguish between the basis and criteria for the grant of a non *Mareva* injunction from that of a *Mareva* injunction (see the analysis in *Zschimmer & Schwarz GmbH & Co KG Chemische Fabriken v. Persons Unknown & Ano*r [2021] 4 CLJ 446; [2021] 7 MLJ 178). In a roundabout way, this distinction also brings home I the point, again, that vital to the grant of a *Mareva* injunction is evidence,

direct or indirect, of a real risk of dissipation or disposal of assets to defeat a judgment of the court. It is only where such a risk is properly established that a court would impose what can potentially be a burdensome and harsh order; even before the merits of the claim have yet to be finally determined.

[122] We therefore doubt that the balance of convenience is, or was ever, a criterion that needs be considered by a court when considering the grant of a *Mareva* injunction. This is perhaps significant enough a point for the Federal Court, should an opportunity present, to address and to settle any doubt that may exist.

Conclusion

[123] In conclusion, we are of the view that the learned judge had erred in law when it was held that the existence of a real risk of dissipation of assets may be presumed.

[124] In the circumstance of this case, we do not see that there was any evidence adduced that warrants any inference that there was a real risk that the appellants or either of them would dissipate their assets to the prejudice of the respondent, should she succeed in securing the reliefs she has sought from the court.

[125] Having regard to the conclusion that we have arrived at in this case, we do not regard the procedural issues raised by the appellants to be of any particular significance and do not find any necessity to deal with them.

[126] Suffice to say that that the assertions that the respondent had failed to make full and frank disclosures, failed to provide any adequate undertaking as to damages and non-compliance with O. 29 r. 1(2A) and (2B), are more in the nature that pertains to procedural improprieties on the part of the respondent rather than the strength of the appellants' defence to the substance of the respondent's allegations. This is not, however, to suggest that conformity with procedural requirements may be dispensed with willy-nilly.

[127] My brothers Mohamad Zabidin bin Mohd Diah and S Nantha Balan JJCA have each had the opportunity to consider this judgment in draft and they have both registered their concurrence with it.

[128] By reason of the foregoing, the appellants' appeal was allowed with costs and the order of the learned High Court Judge of 15 September 2020 was set aside. However, given that learned counsel for the respondent had informed the court of his instructions to seek leave to appeal to the Federal Court against this decision of the court, we found it appropriate to grant an order, which we did, that the setting aside of the order of the High Court dated 15 September 2020 be stayed for three weeks until the 20 June 2021.